In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-440

JOSUE N. SAEZ, PETITIONER

v.

EUGENE G. GOSLEE, as Acting General Counsel and/or PETER G. NASH, General Counsel of the National Labor Relations Board

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. On February 8, 1971, petitioner filed an unfair labor practice charge alleging that the Company[1] had terminated his employment because of his membership in and activities on behalf of the Union,[2] in violation of Section 8(a)(3) and (1) of the National

[1] Sea-Land Service, Inc.

[2] Local 402, Office and Professional Employees Union, AFL-CIO.

Labor Relations Act, 29 U.S.C. 158(a)(3) and (1). The Board's Regional Director, after an administrative investigation, concluded that petitioner was a "supervisor" within the meaning of Section 2(11) of the Act, 29 U.S.C. 152(11), at the time of his discharge and, therefore, was not protected by the statute; accordingly, he refused to issue a complaint on the charge (Pet. App. 40-41). Pursuant to the procedure provided by the Board's rules (Pet. App. 46-47), petitioner appealed to the General Counsel of the Board (Pet. App. 42-44). The General Counsel, relying on two affidavits given by petitioner during the course of the Regional Director's investigation of the charge, upheld the Director's determination that petitioner was a supervisor and denied the appeal (Pet. App. 28-30).

Petitioner filed suit in the United States District Court for the District of Puerto Rico, seeking to compel the General Counsel to issue an unfair labor practice complaint based upon his charge (Pet. App. 31-37). On December 2, 1971, on motion of the General Counsel, the district court dismissed the action on the ground that it lacked jurisdiction to review the General Counsel's refusal to issue a complaint (Pet. App. 19, 23-27).[2] The court of appeals affirmed (Pet. App. 15-18).

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[2] The District Court added that, "as fully detailed in the General Counsel's decision to sustain the Regional Director's dismissal of the charge, there was ample evidence disclosed by the investigation to support the conclusion that plaintiff was a supervisor not protected by Section 8(a)(3) and (1) of the Act" (Pet. App. 27).

2. Section 3(d) of the Act, 29 U.S.C. 153(d), provides that "[t]he General Counsel of the Board * * * shall have final authority on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10 * * * *." As the court of appeals pointed out, "[f]or a quarter of a century this section has been uniformly interpreted to mean that federal courts have no jurisdiction to review the General Counsel's refusal" to issue a complaint (Pet. App. 16, and cases there cited).

Petitioner seeks to avoid this settled rule by arguing that the action of the General Counsel "without first providing a hearing at some stage of his investigation is a denial of procedural due process" (Pet. 2), which the district court should review. Whether the Constitution requires that the full panoply of judicial procedures be used depends upon "[t]he nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding." *Hannah* v. *Larche*, 363 U.S. 420, 442; see also *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895; *Goldberg* v. *Kelly*, 397 U.S. 254, 262-263. As the court below noted, a person who files an unfair labor practice charge with the Board is not entitled "to have an unfair labor practice complaint issue in the same sense that, for example, a welfare recipient has a statutory entitlement to benefits" (Pet. App. 17; compare *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 261-262). The remedies of the National Labor Relations Act protect public interests rather than merely private rights (*Amalgamated Workers* v. *Edi-*

son Co., 309 U.S. 261, 264-265). Thus the General Counsel issues an unfair labor practice complaint only when he believes such action will effectuate the policies of the Act.

Moreover, the General Counsel's determination not to issue a complaint is not akin to a formal adjudication, which normally requires the procedures traditionally associated with the judicial process, but rather to the decision of a prosecuting attorney (see 93 Cong. Rec. 6859, 2 Leg. Hist. (1947) 1623), which is usually made on the basis of an informal, fact-finding investigation. Finally, as the court of appeals noted (Pet. App. 17), "important governmental interests both fiscal and otherwise, * * * would be jeopardized should we require a hearing prior to a final decision on whether to issue an unfair labor practice complaint." For these reasons, the procedure followed by the General Counsel in this case was proper and did not deprive petitioner of due process of law. See also *Braden* v. *Herman*, C.A. 8, No. 72-1054, decided October 5, 1972.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

OCTOBER 1972.

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